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14 Proposed Lead Counsel for Proposed Lead Plaintiff

15 [Additional counsel appear on signature page.]

16 UNITED STATES DISTRICT COURT  
17  
18 NORTHERN DISTRICT OF CALIFORNIA  
19  
20 OAKLAND DIVISION

21 VICTOR J. NG, Individually and on Behalf of )  
22 All Others Similarly Situated, )  
23 Plaintiff, )  
24 vs. )  
25 BERKELEY LIGHTS, INC., et al., )  
26 Defendants. )

Case No. 5:21-cv-09497-HSG

CLASS ACTION

NOTICE OF MOTION AND MOTION FOR  
APPOINTMENT AS LEAD PLAINTIFF,  
AND APPROVAL OF LEAD PLAINTIFF'S  
SELECTION OF LEAD COUNSEL;  
MEMORANDUM OF LAW IN SUPPORT  
THEREOF

DATE: May 26, 2022

TIME: 2:00 p.m.

CTRM: 2, 4th Floor

JUDGE: Hon. Haywood S. Gilliam, Jr.

1 **NOTICE OF MOTION AND MOTION**

2 TO: ALL PARTIES AND THEIR RESPECTIVE COUNSEL OF RECORD

3 PLEASE TAKE NOTICE that on May 26, 2022 at 2:00 p.m., or as soon thereafter as the  
4 matter may be heard before the Honorable Haywood S. Gilliam, Jr., Pompano Beach Police &  
5 Firefighters' Retirement System (the "Retirement System") will and hereby does move this Court  
6 pursuant to the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. §78u-  
7 4(a)(3)(B), for an order appointing the Retirement System as Lead Plaintiff and approving its  
8 selection of Robbins Geller Rudman & Dowd LLP as Lead Counsel. This Motion is made on the  
9 grounds that the Retirement System is the "most adequate plaintiff" to serve as lead plaintiff  
10 pursuant to the PSLRA. In support of this Motion, the Retirement System submits herewith a  
11 Memorandum of Points and Authorities and the Declaration of Jennifer N. Caringal ("Caringal  
12 Decl.").

13 **MEMORANDUM OF LAW**

14 **I. INTRODUCTION**

15 The action was brought on behalf of purchasers of Berkeley Lights, Inc. ("Berkeley Lights"  
16 or the "Company") common stock between July 17, 2020 and September 14, 2021, inclusive (the  
17 "Class Period") against the Company and certain of its former and current senior executives. The  
18 PSLRA directs courts to appoint as lead plaintiff the class member it "determines to be most capable  
19 of adequately representing the interests of class members." 15 U.S.C. §78u-4(a)(3)(B)(i). The  
20 Retirement System should be appointed lead plaintiff because it timely filed this Motion, has a  
21 substantial financial interest in the outcome of this litigation, and otherwise satisfies Rule 23's  
22 typicality and adequacy requirements. *See* 15 U.S.C. §78u-4(a)(3)(B)(iii). In addition, the  
23 Retirement System's selection of Robbins Geller Rudman & Dowd LLP to serve as lead counsel  
24 should be approved because the Firm possesses extensive experience prosecuting securities class  
25 actions and will adequately represent the interests of all class members. *See* §IV.B., *infra*.

26 **II. STATEMENT OF ISSUES TO BE DECIDED**

27 1. Whether the Court should appoint the Retirement System as lead plaintiff pursuant to  
28 15 U.S.C. §78u-4(a)(3)(B); and

2. Whether the Court should approve the Retirement System's selection of Robbins Geller as lead counsel pursuant to 15 U.S.C. §78u-4(a)(3)(B)(v).

### **III. STATEMENT OF FACTS**

Berkeley Lights is a biotechnology company headquartered in Emeryville, California. Berkeley Lights owns and operates a proprietary platform for analyzing and processing cell data for use in the development and commercialization of biotherapeutics and other cell-based products, focusing on the markets of antibody therapeutics, cell therapy, and synthetic biology. The centerpiece of the Berkeley Lights platform is the Company's advanced automation system, the Beacon. The Beacon is a fully automated, high throughput system designed to allow detailed cell analysis at scale. The Beacon is used by Berkeley Lights' customers for tasks such as antibody discovery and cell line development.

The complaint alleges that throughout the Class Period defendants made false and misleading statements and failed to disclose that: (i) Berkeley Lights' flagship instrument, the Beacon, suffered from numerous design and manufacturing defects including breakdowns, high error rates, data integrity issues, and other problems, limiting the ability of biotechnology companies and research institutions to consistently use the machines at scale; (ii) Berkeley Lights had received numerous customer complaints regarding the durability and effectiveness of Berkeley Lights' automation systems, including complaints related to the design and manufacturing; (iii) the actual market for Berkeley Lights' products and services was a fraction of the \$23 billion represented to investors because of, among other things, the relatively high cost of Berkeley Lights' instruments and consumables and inability to provide the sustained performance necessary to justify these high costs; and (iv) as a result, defendants' statements to investors during the Class Period regarding Berkeley Lights' business, operations, and financial results were materially false and misleading.

On September 15, 2021, research analyst firm Scorpion Capital issued a scathing investigative report, titled "Fleecing Customers And IPO Bagholders With A \$2 Million Black Box That's A Clunker, While Insiders and Silicon Valley Bigwigs Race To Dump Stock. Just Another VC Pump at 27X Sales. Target Price: \$0," which criticized Berkeley Lights' technology and questioned the durability of Berkeley Lights' most important business relationships and its business

1 growth plan. Although Scorpion Capital stated it was short Berkeley Lights, the information  
2 contained in the Scorpion Capital report was purportedly based on extensive proprietary research and  
3 analysis, including 24 research interviews with former Berkeley Lights employees, industry  
4 scientists, and end users across 14 of Berkeley Lights' largest customers. Among other findings, the  
5 report detailed a "trail of customers who allege they were 'tricked,' misled, or over-promised into  
6 buying a \$2 million lemon" and concluded that the "reality is so far from BLI's grandiose hype that  
7 we believe its product claims and practices may constitute outright fraud." ECF No. 1 at ¶35. On  
8 this news, the price of Berkeley Lights common stock fell by nearly 30% over two trading days,  
9 closing at \$23.53 on September 16, 2021, damaging investors.

10 As a result of defendants' wrongful acts and omissions, and the precipitous decline in the  
11 market value of Berkeley Lights' common stock, the Retirement System and other class members  
12 have suffered significant losses and damages.

#### 13 **IV. ARGUMENT**

##### 14 **A. The Retirement System Is the "Most Adequate Plaintiff" and Should** 15 **Be Appointed Lead Plaintiff**

16 The PSLRA establishes the procedure for the appointment of a lead plaintiff in "each private  
17 action arising under [the Securities Exchange Act of 1934] that is brought as a plaintiff class action  
18 pursuant to the Federal Rules of Civil Procedure." 15 U.S.C. §78u-4(a)(1). Specifically, the PSLRA  
19 provides that the Court shall adopt a presumption that the most adequate plaintiff is the person or  
20 group of persons that –

21 (aa) has either filed the complaint or made a motion in response to a notice . . . ;

22 (bb) in the determination of the court, has the largest financial interest in the relief  
sought by the class; and

23 (cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil  
24 Procedure.

25 15 U.S.C. §78u-4(a)(3)(B)(iii); *see also In re Cavanaugh*, 306 F.3d 726 (9th Cir. 2002). The  
26 Retirement System meets each of these requirements and should be appointed as Lead Plaintiff.

1                   **1.       This Motion Is Timely**

2           On December 8, 2021, the statutory notice was published on *Business Wire* advising class  
3 members of the pendency of the action, the alleged claims, the class definition, and the option of  
4 moving the Court to be appointed as lead plaintiff by February 6, 2022. *See* Caringal Decl., Ex. A.  
5 February 6, 2022 was a Sunday and pursuant to Fed. R. Civ. P. 6(a)(1)(C), the “next day that is not a  
6 Saturday, Sunday, or legal holiday,” is February 7, 2022. Because the Retirement System’s Motion  
7 has been timely filed, it is eligible for appointment as lead plaintiff.

8                   **2.       The Retirement System Has the Largest Financial Interest in**  
9                   **the Relief Sought by the Class**

10           During the Class Period, the Retirement System purchased 3,685 shares of Berkeley Lights  
11 common stock and suffered approximately \$97,396 in losses. *See* Caringal Decl., Exs. B, C. To the  
12 best of the Retirement System’s counsel’s knowledge, there are no other plaintiffs with a larger  
13 financial interest. Therefore, the Retirement System satisfies the PSLRA’s prerequisite of having the  
14 largest financial interest.

15                   **3.       The Retirement System Is Typical and Adequate of the**  
16                   **Putative Class**

17           In addition to possessing the largest financial interest, a lead plaintiff must also “otherwise  
18 satisf[y] the requirements of Rule 23 of the Federal Rules of Civil Procedure.” 15 U.S.C. §78u-  
19 4(a)(3)(B)(iii)(I)(cc). Rule 23 requires that “the claims or defenses of the representative parties are  
20 typical of the claims or defenses of the class; and [that] the representative parties will fairly and  
21 adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(3)-(4); *Cavanaugh*, 306 F.3d at  
22 730 (focusing “in particular” on typicality and adequacy at the lead plaintiff stage).

23           The test of typicality is ““whether other members have the same or similar injury, whether  
24 the action is based on conduct which is not unique to the named plaintiffs, and whether other class  
25 members have been injured by the same course of conduct.”” *Hanon v. Dataproducts Corp.*, 976  
26 F.2d 497, 508 (9th Cir. 1992) (citation omitted). The adequacy requirement is met if no conflicts  
27 exist between the representative and class interests and the representative’s attorneys are qualified,  
28 experienced, and able to vigorously prosecute the action on behalf of the class. *See* Fed. R. Civ. P.  
23(a)(4).

1 Like all putative class members, the Retirement System purchased Berkeley Lights common  
2 stock during the Class Period and suffered harm as a result of defendants' alleged misconduct. As  
3 such, the Retirement System suffered the same injuries as the other putative class members as a  
4 result of the same alleged conduct by defendants and has claims based on the same legal issues. In  
5 addition, the Retirement System has a substantial stake in the outcome of the case, providing the  
6 requisite incentive to vigorously represent the class's claims. The Retirement System has not  
7 conflated its own financial interest with the Berkeley Lights transactions of any third-party entities in  
8 which the Retirement System may have invested. And, as discussed below, the Retirement System  
9 has selected qualified counsel experienced in securities litigation.

10 Finally, as an institutional investor, the Retirement System is precisely the type of investor  
11 whose participation in securities class actions Congress sought to encourage through the enactment  
12 of the PSLRA: "Both the Conference Committee Report and the Senate Report state that the purpose  
13 of the legislation was to encourage institutional investors to serve as lead plaintiff, predicting that  
14 their involvement would significantly benefit absent class members." *In re Cendant Corp. Litig.*,  
15 264 F.3d 201, 273 (3d Cir. 2001).

16 Accordingly, the Court should find that the Retirement System has made a *prima facie*  
17 showing of typicality and adequacy.

18 **B. The Court Should Approve the Retirement System's Selection of**  
19 **Counsel**

20 The PSLRA vests authority in the lead plaintiff to select and retain lead counsel, subject to  
21 the Court's approval. *See* 15 U.S.C. §78u-4(a)(3)(B)(v). The Court should not disturb the lead  
22 plaintiff's choice of counsel unless it is necessary to protect the interests of the class. *See In re*  
23 *Cohen*, 586 F.3d 703, 711-12 (9th Cir. 2009) ("if the lead plaintiff has made a reasonable choice of  
24 counsel, the district court should generally defer to that choice"); *Cavanaugh*, 306 F.3d at 732-35.  
25 The Retirement System has selected Robbins Geller as lead counsel in this case.

26 Robbins Geller attorneys regularly practice complex securities litigation before this Court.<sup>1</sup>

27 <sup>1</sup> For a detailed description of Robbins Geller's track record, resources, and attorneys, please  
28 see <https://www.rgrdlaw.com>. A hard copy of the Firm's resume is available upon the Court's  
request, if preferred.

1 The Firm's securities practice group includes numerous trial attorneys and many former federal and  
2 state prosecutors, and utilizes an extensive group of in-house experts to aid in the prosecution of  
3 complex securities issues. Courts throughout the country, including in this District, have noted  
4 Robbins Geller's reputation for excellence and appointed Robbins Geller attorneys to lead roles in  
5 hundreds of complex class action securities cases. *See, e.g., In re Twitter Inc. Sec. Litig.*, 326 F.R.D.  
6 619 (N.D. Cal. 2018).

7 In the last two years alone, Robbins Geller has recovered more than \$3 billion for investors in  
8 securities class actions, including in: *In re Valeant Pharm. Int'l, Inc. Sec. Litig.*, No. 3:15-cv-07658-  
9 MAS-LHG (D.N.J.) (\$1.21 billion recovery); *In re Am. Realty Cap. Props., Inc. Litig.*, No. 1:15-mc-  
10 00040-AKH (S.D.N.Y.) (\$1.02 billion recovery); and *Smilovits v. First Solar, Inc.*, No. 2:12-cv-  
11 00555-DGC (D. Ariz.) (\$350 million recovery). Robbins Geller attorneys have also obtained the  
12 largest securities fraud class action recoveries in the Fifth, Sixth, Seventh, Eighth, Tenth, and  
13 Eleventh Circuits.<sup>2</sup> And, while trials in shareholder class actions are rare, Robbins Geller has tried  
14 nine cases, including a February 2019 trial in the Central District of California in *HsingChing Hsu v.*  
15 *Puma Biotechnology, Inc.*, No. 8:15-cv-00865-AG (C.D. Cal.), where the jury returned a verdict for  
16 plaintiff, finding that defendants Puma Biotechnology, Inc. and its CEO committed securities fraud.

17 Based upon Robbins Geller's extensive experience and proven track record as counsel in  
18 securities class actions, the Retirement System's selection of Robbins Geller as lead counsel is  
19 reasonable and should be approved.

20  
21  
22 <sup>2</sup> *See, e.g., In re Enron Corp. Sec. Litig.*, No. 4:01-cv-03624 (S.D. Tex.) (\$7.3 billion recovery  
23 is largest securities class action recovery in U.S. history and in the Fifth Circuit); *In re Cardinal*  
24 *Health, Inc. Sec. Litig.*, No. 2:04-cv-00575-ALM (S.D. Ohio) (\$600 million recovery is the largest  
25 securities class action recovery in the Sixth Circuit); *Lawrence E. Jaffe Pension Plan v. Household*  
26 *Int'l Inc.*, No. 1:02-cv-05893 (N.D. Ill.) (\$1.575 billion recovery is the largest securities class action  
27 recovery ever following a trial as well as the largest securities class action recovery in the Seventh  
28 Circuit); *In re UnitedHealth Grp. Inc. PSLRA Litig.*, No. 0:06-cv-01691-JMR-FLN (D. Minn.) (\$925  
million recovery is the largest securities class action recovery in the Eighth Circuit); *In re Qwest*  
*Commc'ns Int'l, Inc. Sec. Litig.*, No. 1:01-cv-01451-REB-KLM (D. Colo.) (\$445 million recovery  
for the class is the largest securities recovery in the Tenth Circuit; Robbins Geller attorneys also  
created a mechanism that allowed class members to share an additional \$250 million recovered by  
the SEC); *In re HealthSouth Corp. Sec. Litig.*, No. 2:03-cv-01500-KOB-TMP (N.D. Ala.) (\$671  
million recovery is the largest securities class action recovery in the Eleventh Circuit).

1 **V. CONCLUSION**

2 The Retirement System has satisfied each of the PSLRA's requirements for appointment as  
3 lead plaintiff. As such, the Retirement System respectfully requests that the Court appoint it as Lead  
4 Plaintiff and approve its selection of Lead Counsel.

5 DATED: February 7, 2022

Respectfully submitted,

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22 Proposed Lead Counsel for Proposed Lead  
23 Plaintiff



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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on February 7, 2022, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses on the attached Electronic Mail Notice List, and I hereby certify that I caused the mailing of the foregoing via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

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